Office of
The City Attorney
City of San Diego

MEMORANDUM
MS 59

(619) 533-5800

DATE: July 27, 2012

TO: Honorable Mayor and City Council Members

FROM: City Attorney

SUBJECT: The Future of Special Assessment Districts in the City of San Diego

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INTRODUCTION

Special assessment districts can generally be divided into two categories: business-based and property-based. A business-based district is one in which liability for the assessment is premised upon a person's operation of a business within the district, whereas a property-based district is one in which liability for the assessment is premised upon a person's property ownership. Examples of business-based assessment districts in which business-based assessments are levied in the City of San Diego are Business Improvement Districts (BIDs) and the Tourism Marketing District (TMD). Examples of property-based assessment districts in which property-based assessments are levied in the City of San Diego are Maintenance Assessment Districts (MADs) and the Downtown Property and Business Improvement District (Downtown PBID).

Due to some recent developments, members of the San Diego City Council and the Mayor's Office have inquired as to the future of various assessment districts in the City of San Diego. More specifically, questions have arisen as to the effect of Proposition 26 (Prop 26) on business-based assessment districts and the effect of the Court of Appeal decision in the Greater Golden Hill case on property-based assessment districts.

QUESTIONS PRESENTED

1. What effect does the passage of Prop 26 have on the future of business-based assessment districts in the City of San Diego?

2. What effect does the Court of Appeal ruling in the case of *Golden Hill Neighborhood Association, Inc. v. City of San Diego* have on the future of property-based assessment districts in the City of San Diego?

SHORT ANSWERS

1. Prop 26 allows the City to impose a new business-based assessment without voter approval only if the program of improvements and activities to be funded by the assessment can be limited to benefits or services provided directly to the charged businesses and not to others who are not charged. Many of the improvements and activities of business-based assessment districts historically provided may be difficult to justify under Prop 26's new, seemingly more stringent standard.

2. The Court of Appeal stated that essentially every improvement and activity provided by San Diego's property-based assessment districts results in some general benefit that must be paid for by non-assessment revenues. Therefore, any new property-based assessment district will likely have to contain some non-assessment revenue contribution.

ANALYSIS

I. BUSINESS-BASED ASSESSMENT DISTRICTS ARE SUBJECT TO PROPOSITION 26

A. Proposition 26 Defines "Tax"

In November 2010, California voters approved Prop 26. The essence of Prop 26, as it applies to local government, is an amendment to the definitions in Article XIII C of the California Constitution governing taxes. Previously, the California Constitution did not define the term "tax," but instead, relied on court decisions to distinguish taxes from other government revenue measures such as assessments, fees, and fines. Prop 26 defines every government imposition of a duty to pay funds to government as a tax unless one of seven enumerated exceptions applies. Cal. Const. art. XIII C, § 1(e).

Prop 26 states:

> (e) As used in this article [i.e., Article XIII C of the California Constitution], "tax" means any levy, charge, or exaction of any kind imposed by a local government, except the following:
>
> (1) A charge imposed for a specific benefit conferred or privilege granted directly to the payor that is not provided to those not charged, and which does not exceed the reasonable costs to the local government of conferring the benefit or granting the privilege.
>
> (2) A charge imposed for a specific government service or product provided directly to the payor that is not provided to those not

> charged, and which does not exceed the reasonable costs to the local government of providing the service or product.
>
> (3) A charge imposed for the reasonable regulatory costs to a local government for issuing licenses and permits, performing investigations, inspections, and audits, enforcing agricultural marketing orders, and the administrative enforcement and adjudication thereof.
>
> (4) A charge imposed for entrance to or use of local government property, or the purchase, rental, or lease of local government property.
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> (5) A fine, penalty, or other monetary charge imposed by the judicial branch of government or a local government, as a result of a violation of law.
>
> (6) A charge imposed as a condition of property development.
>
> (7) Assessments and property-related fees imposed in accordance with the provisions of Article XIII D.[1]
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> The local government bears the burden of proving by a preponderance of the evidence that a levy, charge, or other exaction is not a tax, that the amount is no more than necessary to cover the reasonable costs of the governmental activity, and that the manner in which those costs are allocated to a payor bear a fair or reasonable relationship to the payor's burdens on, or benefits received from, the governmental activity.

Id.

B. Proposition 26 Does Not Affect San Diego's Existing Business-Based Assessment Districts

Prop 26 does not affect San Diego's existing business-based assessment districts because Prop 26 will not be applied retroactively. A statute will not be applied retroactively unless there is an express retroactivity provision or it is abundantly clear from extrinsic sources that the legislature

[1] The seventh exception to Prop 26's definition of tax for "[a]ssessments and property-related fees imposed in accordance with the provisions of Article XIII D" excludes the City's property-based assessments, such as MADs and the Downtown PBID, because those assessments are imposed in accordance with Article XIII D of the California Constitution. Prop 26 does apply to business-based assessments, but it would not affect existing business-based districts in San Diego.

or the voters must have intended the statute to be applied retroactively. *Evangelatos v. Superior Court*, 44 Cal. 3d 1188, 1209 (1988).

Prop 26 expressly applies retroactively to State measures adopted between January 1, 2010 and the Prop 26 effective date, but does not contain any such retroactivity provision with respect to local governments. Therefore, we may presume that the retroactivity provision was specifically excluded as it relates to local governments. To do otherwise, would violate the canon of statutory construction, *expressio unius est exclusio alterius* ("to say one thing is to exclude another"). "This maxim 'expresses the learning of common experience that when people say one thing they do not mean something else.'" *Arden Carmichael, Inc. v. County of Sacramento*, 93 Cal. App. 4th 507, 515-16 (2001) (citing 2A Singer, Sutherland Statutes and Statutory Construction, *Intrinsic Aids*, § 47.24, at 319-20 (6th ed. 2000)). "'While every word of a statute must be presumed to have been used for a purpose, it is also the case that every word excluded from a statute must be presumed to have been excluded for a purpose.'" *Arden Carmichael*, 93 Cal. App. 4th at 516 (citing 2A Singer, Sutherland Statutes and Statutory Construction, *Literal Interpretation*, § 46.06, at 192 (6th ed. 2000)). This presumption against retroactivity was supported by the Legislative Analyst in its analysis of Prop 26, which stated that existing fees and charges are not affected by Prop 26 unless they are later increased or extended. Proposition 26, Analysis by Legislative Analyst, California General Election, Tuesday, November 2, 2010, Official Voter Information Guide at 58. Therefore, the City's existing business-based assessments are not converted to taxes under Prop 26 unless the assessment is increased or extended, as those terms are defined.

With respect to the City's BIDs, there are no sunset provisions or expiration dates, so the City would not extend the assessments levied therein. Cal. Gov't Code § 53750(e). The City does not increase BID assessments, as defined for Prop 26 purposes, because the City does not increase the applicable rate used to calculate the business-based assessment, revise the methodology by which the business-based assessment is calculated, or adjust the amount charged beyond what was previously approved. Cal. Gov't Code § 53750(h).

C. Future Business-Based Assessments May Be Taxes Under Proposition 26

Pursuant to State statutes on BIDs and PBIDs[2], business-based assessments must be levied on the basis of the estimated benefit to the businesses within the district. Cal. Sts. & High. Code §§ 36536, 36632(b). Therefore, historically the City could impose these business-based assessments so long as the City found that the businesses would benefit and the City complied with the applicable notice, hearing, and protest procedures set forth in the respective State statute. However, since the passage of Prop 26, unless the City can identify an applicable exception, the City may be prohibited from levying any new or increased business-based assessment without voter approval.

[2] Although, the Downtown PBID is property-based assessment district, and thus, specifically exempted from Prop 26, the State PBID statute also allows for the formation of business-based assessment districts.

As discussed above, the first exception to Prop 26 exempts from the definition of tax "charge[s] imposed for a specific benefit conferred or privilege granted directly to the payor that is not provided to those not charged, and which does not exceed the reasonable costs to the local government of conferring the benefit or granting the privilege." Cal. Const. art. XIII C, § 1(e)(1). Language used in the first exception requiring a "specific benefit" provided "directly to the payor that is not provided to those not charged" and "which does not exceed the reasonable costs to the local government of conferring the benefit or granting the privilege" suggests a more difficult test than previously required for the levying of business-based assessments.

Previously, under the State statutes, there was no requirement of the City to specifically define what benefit was accruing to the businesses assessed nor was it fatal if such benefit tangentially accrued to people or business that were not assessed. Rather, the City need only have to show "estimated benefit to the businesses" Cal. Sts. & High. Code §§ 36536, 36632(b). Prop 26 could be read to suggest that no one can be charged for an improvement or activity if those not charged also receive the benefit. Thus, a court could find that where an improvement or activity, such as street furniture, decorations, security, or public events, is provided within a geographic business area, rather than directly to a specific business, that improvement or activity is also "provided" to the public. Therefore, the assessment would not meet the exception to Prop 26 because the improvement or activity is being provided to those not charged the assessment.

The second exception to Prop 26 address charges "imposed for a specific government service or product provided directly to the payor that is not provided to those not charged, and which does not exceed the reasonable costs to the local government of providing the service or product." Cal. Const. art. XIII C, § 1(e)(2). Again, even if the types of improvements and activities provided by the City's business-based assessment districts would fit within the definition of a government service or product, it is not clear that the services traditionally provided by these districts are provided directly to the payor and not provided to those who do not pay.

While some may argue that the traditional improvements and activities provided by business-based assessment districts meet one or both of the two exceptions discussed above, it is far from certain. In fact, the Legislative Analyst's impartial analysis of Prop 26 specifically identifies business-based assessments as meeting the definition of a tax requiring voter approval:

> [S]ome business assessment could be considered to be taxes because government uses the assessment revenues to improve shopping districts (such as providing parking, street lighting, increased security, and marketing), rather than providing a direct and distinct service to the business owner.

Proposition 26, Analysis by Legislative Analyst, California General Election, Tuesday, November 2, 2010, Official Voter Information Guide at 58.

The City's TMD[3] will expire on December 31, 2012 and City staff is currently working on renewing the TMD. Prop 26 will be one of the major obstacles facing the City if the TMD renewal is challenged. Some activities are more justifiable under the Prop 26 test[4], such as marketing specific businesses in the TMD. However, other improvements and activities that historically have been provided by BIDs such as right-of-way maintenance and decoration, and other public amenities may be difficult, if not impossible, to justify.

Absent clear direction from the courts or legislature, this Office advises that the City should not impose a new business-based assessment without voter approval unless the program of improvements and activities to be funded by the assessment can be limited to benefits or services provided directly to the charged businesses and not to others who are not charged.

II. PROPERTY-BASED ASSESSMENT DISTRICTS REQUIRE CONTRIBUTIONS FROM NON-ASSESSMENT REVENUE SOURCES.

A. In Golden Hill Neighborhood Association, Inc. v. City of San Diego, the Court of Appeal Rejected the Way the City Has Historically Analyzed Special and General Benefits

In July 2007, the City of San Diego established the Greater Golden Hill Maintenance Assessment District (GGHMAD) pursuant to the Landscape and Lighting Act of 1972, California Streets and Highways Code sections 22500-22679 (the MAD Act) and Chapter 6, Article 5, Division 2 of the San Diego Municipal Code (the MAD Ordinance). In August 2007, the Greater Golden Hill Neighborhood Association and John McNab (Petitioners) sued the City, contesting the legality of the GGHMAD and seeking the dissolution of the GGHMAD (First Petition). Petitioners contended the establishment of the GGHMAD did not comply with article XIII D of the California Constitution enacted by passage of Proposition 218 in 1996 (Proposition 218). While the First Petition was pending, the GGHMAD commenced operation. Petitioners filed a second lawsuit in 2008 challenging GGHMAD's Fiscal Year 2009 assessment (Second Petition).

The First and Second Petitions were consolidated and were tried before Judge Richard Whitney in October 2009. Judgment was entered in favor of Petitioners on the "For Writ of Mandamus" cause of action contained in the First Petition, because the court found that the City's Engineer's Report, relied upon to establish the GGHMAD, was defective and violated Proposition 218 in that it failed to separate the general benefits to the public at large from the special benefits the GGHMAD assessed parcels would receive. The trial court ruled in favor of the City on all other causes of action. The City and Petitioners both appealed to the Fourth District Court of Appeal (Court of Appeal) from the Final Judgment.

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[3] In San Diego, the TMD is a business-based assessment district formed pursuant to a local procedural ordinance that is based on the State PBID statute.

[4] *See* Report to City Council No. RC-2011-36.

On September 22, 2011, the Court of Appeal issued its opinion. The Court of Appeal found that the City's Engineer's Report was defective and the City's establishment of the GGHMAD violated Proposition 218. Among other things, the Court of Appeal found that the Engineer's Report was defective because it failed to adequately address the special benefits to be conferred on each parcel within the GGHMAD and the general benefits to be appreciated overall by the public.[5] The Court of Appeal instructed the trial court to issue a writ directing the City to rescind Resolution No. R-0302887, the GGHMAD Formation Resolution, invalidating the GGHMAD assessments. The trial court issued the Writ on February 3, 2012.

The decision called into question the way the City has historically analyzed special and general benefits. With the MADs and the Downtown PBID, it has been the practice of the City to look at what the City would provide, but-for the existence of the district. That level of service would then become the "baseline." Then, the City would look at what services the district would provide. The services or service levels that would otherwise not be provided to those within the district were considered 100% special benefit, and therefore could be fully funded by the property-based assessments.

This type of approach to analyzing special and general benefits has been upheld in at least one previous appellate court decision. *See Dahms v. Downtown Pomona Property & Business Improvement District*, 174 Cal. App. 4th 708 (2009). However, in more recent cases, including the GGHMAD case, the courts have more closely scrutinized the manner in which assessing agencies have analyzed special and general benefits. The Court of Appeal stated, with respect to the City's historical practice of analyzing special and general benefits:

> The statement in the engineer's report that "the assessments provide special benefit to property in the various Districts over and above the general benefits conferred by the general facilities of the City" does not establish that the assessments would not also provide *general* benefit in addition to special benefit. ". . . the courts of this state have long recognized[] that virtually all public improvement projects provide general benefits." Here, the statement in the engineer's report that "*properties* outside the District do not receive the benefit of the Services funded by the District" (italics added) does not establish that the *general public* within and outside the District would not receive some benefit from those services. A number of the services specified in the engineer's report, including trail beautification, homelessness

[5] Other reasons the Court of Appeal found the Engineer's Report defective were: (1) the Engineer's Report failed to set forth a comprehensible assessment methodology to explain why City-owned open space was treated differently than other vacant parcels; and (2) the City-owned parcels were inexplicably given greater voting weight (and greater assessment obligation) than other vacant parcels, the net result of which, the Court of Appeal found, compromised the transparency and integrity of the GGHMAD election process and could have been the sole reason the election to form the GGHMAD was successful in the first place.

> patrolling, Web site information, and special events, provide obvious benefit to the general public.

Golden Hill Neighborhood Assn, Inc. v. City of San Diego, 199 Cal. App. 4th 416, 439 (2011) (citation omitted).

The Court of Appeal stated that essentially every improvement and activity provided by San Diego's property-based assessment districts results in some general benefit. *Id.* Property-based assessments may only be used to pay for the special benefits provided by the improvements and activities of a district and may not be used to pay for the general benefits. Cal. Const. art. XIII D, § 4(a). Therefore, an engineer must separate and quantify the special and general benefits accruing from a district's improvements and activities by apportioning the costs between the two types of benefits and assessing property owners only for the portion of the cost representing special benefits. *Golden Hill Neighborhood Assn.*, 199 Cal. App. 4th at 438. Such apportionment must be reasonable and based on credible evidence[6]. *Id.* In light of the *Golden Hill* decision, any new property-based assessment district should contain some non-assessment revenue contribution to pay for the general benefits. In new developments, this contribution could conceivably be in the form of an endowment paid by the developer or a continuing payment by a homeowners association. However, in older neighborhoods, the source of this contribution may be more difficult to establish without drawing upon some other revenue source, such as the City's General Fund.

B. A Challenge to a Future Property-Based Assessment District under an Equal Protection Claim Will Likely Fail.

The notion of the City contributing General Fund revenue to new property-based assessments has caused concern about the fairness to the already existing property-based assessments. Legally, this would likely take the shape of an equal protection argument under the equal protection clauses of the California and United States Constitutions.[7] The assessment statutes are fair and impartial on their face. Therefore, any equal protection claim would have to be made on the basis of discriminatory application of the law. To establish a cause of action for discriminatory application one would have to show that such person(s) has been deliberately singled out on the basis of some invidious criterion and that the erroneous application of the

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[6] The court in the *Golden Hill* case even provided an example of how such apportionment might be calculated: "A hypothetical example of such apportionment would be that if property owners are to be specially assessed for street lighting that will provide both a special benefit for residents of the street and a general benefit to the general public using the street, a reasonable separation and quantification of general and special benefit would be to determine the approximate percentage of daily (or nightly) trips on the street made by the specially benefitted residents as opposed to other members of the public and recoup only that percentage of the cost of the lighting through the special assessment." *Golden Hill Neighborhood Assn.*, 199 Cal. App. 4th at 438 n.18.

[7] The Equal Protection Clause of the California Constitution, provides that "[a] person may not be . . . denied equal protection of the laws . . . ." Cal. Const. art. I, § 7(a). The Equal Protection Clause of the United States Constitution provides that "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

statute was due to a discriminatory design of the City Council. *Great-West Life Assurance Co. v. State Bd. of Equalization*, 19 Cal. App. 4th 1553, 1560 (1993). """[M]ere errors of judgment by officials will not support a claim of discrimination. There must be something more – something which in effect amounts to an intentional violation of the essential principle of practical uniformity." *Id.* at 1560-61 (citations omitted). "The unlawful administration by state officers of a state statute fair on its face, resulting in its unequal application to those who are entitled to be treated alike, is not a denial of equal protection unless there is shown to be present in it an element of intentional or purposeful discrimination."" *Id.* (citations omitted).
It would be difficult to show such intentional discrimination here. There is nothing to suggest that property owners in future property-based assessment districts are being singled out for favorable treatment or that the City's actions are clearly designed to discriminate against those property owners that live in previously formed districts. Thus, any claim would have to show the type of invidious discrimination against which the equal protection clauses are meant to protect.

C. Due to the Risks Associated with Assessment Districts to the City, this Office Suggests that Interested Property Owners and Businesses Consider Forming Private Associations to Implement the Improvements Activities Desired

The current legal landscape with respect to both business-based and property-based assessment districts is treacherous. The passage of Prop 26 has left the legality of business-based assessments in limbo until it is clarified by legislation or litigation. The *Golden Hill* holding has imposed upon the City and its hired assessment engineers the seemingly impossible task of dividing nearly every improvement and activity into special and general benefit and quantifying each based on solid, credible evidence. *Golden Hill Neighborhood Assn.* 199 Cal. App. 4th 416 at 438. One could imagine the difficulty in attempting to quantify how much special benefit accrues to the assessed parcels versus how much general benefit accrues to the general public for improvements and activities like decorative streetlights, public benches, sidewalk cleaning, security patrols, or neighborhood signage. Yet, if such analysis is determined to be insufficient by a court, it is ultimately the City that is liable. A potential solution to this dilemma is for the businesses or property owners to form their own private association and "assess" each of the members for the benefit conferred. The association could also consider recording instruments that would act as a lien on their businesses or property to ensure payment and participation. There is nothing preventing interested businesses or property owners from doing so. This private association approach would eliminate all risk to the City and its General Fund. Alternatively, interested property owners could pursue the formation of a Community Facilities District under the Mello-Roos Community Facilities Act of 1982, California Government Code sections 53311-53368.3, which allows these districts to collect special taxes to finance similar projects with the approval of two-thirds of the qualified voters.

CONCLUSION

Prop 26 defines every government imposition of a duty to pay funds to government as a tax unless one of seven enumerated exceptions applies. It is not clear whether the City's traditional business-based assessments can meet one of those exceptions. If the City attempts to form a new business-

based assessment district, the City must be cautious to not impose an assessment without voter approval unless the program of improvements and activities to be funded by the assessment can be limited to benefits or services provided directly to the charged businesses and not to others who are not charged. Many of the improvements and activities that historically have been provided by the BIDs may be difficult, if not impossible, to justify under Prop 26's definition of a tax. The City will not know how the courts will apply Prop 26 to business-based assessments until a case is actually litigated and finally decided, which could take years. Prop 26 is not retroactive, however, and therefore does not apply to the City's existing BIDs unless the assessment is increased or extended.

The Court of Appeal in the case of *Golden Hill Neighborhood Association, Inc. v. City of San Diego* essentially stated that every improvement and activity provided by San Diego's property-based assessment districts results in some general benefit that must be paid for by non-assessment revenues. Therefore, any new property-based assessment district must contain some non-assessment revenue contribution. In new developments, this contribution could conceivably be in the form of an endowment paid by the developer. However, in older neighborhoods, this contribution may be more difficult to raise without drawing upon the City's General Fund.

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